

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

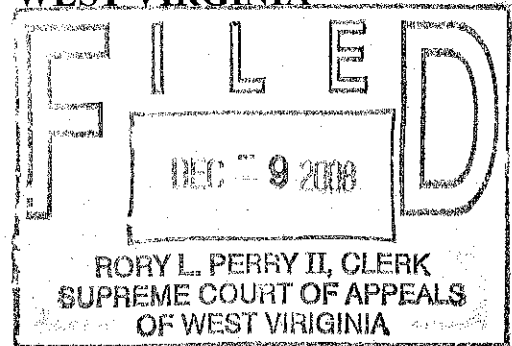
**CLIFFORD CRUM,**

**Appellant**

**v.**

**Appeal No.: 080848**

**Raleigh Co. Civil Action No.: 05-C-296-B**



**EQUITY INNS, INC., d/b/a THE HAMPTON INN;  
VIM., INC.; TRAVELERS PROPERTY CASUALTY INSURANCE  
COMPANY; CONSTRUCTION CONCEPTS, INC.;  
BECKLEY HOTEL LIMITED PARTNERSHIP,  
a West Virginia Partnership; WRIGHT & ASSOCIATES;  
and JOHN DOE,**

**Appellees.**

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**APPELLEE EQUITY INNS, INC., d/b/a THE HAMPTON INN'S  
BRIEF IN OPPOSITION TO APPELLANT'S BRIEF**

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA:**

COMES NOW this Appellee, Equity Inns, Inc. d/b/a The Hampton Inn, by counsel, Mary Beth Chapman, Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to West Virginia Rule of Appellate Procedure 10(b), and hereby submits the following brief in opposition to Clifford Crum's Appeal.

**I. STATEMENT OF THE CASE**

On March 31, 2005, Appellant Clifford Crum filed suit against Equity Inns, Inc., d/b/a The Hampton Inn; Virginia Inn Management of W. Va., Inc. (now known as VIM, Inc.); and John Doe (now represented as Construction Concepts, Inc.; Beckley Hotel Limited Partnership; and Wright & Associates) alleging that on or about July 7, 2004, he was a business invitee of The Hampton Inn and was attending a meeting in one of its conference rooms when a light fixture situated above his head came loose, fell from the ceiling, and struck him in the head as a result of John Doe's negligence in failing to properly install the lighting fixture to the ceiling, VIM, Inc.'s negligence in failing to properly inspect and maintain its premises in a safe manner prior to the sale of the property, and Equity Inns' negligence in failing to properly inspect and maintain the premises in a safe manner.

Upon information and belief, Defendant Beckley Hotel Limited Partnership and/or Defendant VIM, Inc. contracted in or around 1992 with Defendant Construction Concepts, Inc. or Defendant Wright & Associates to construct the building that now operates as The Hampton Inn at 110 Harper Park Drive in Beckley, West Virginia. The architect on this building project was W.R. Eades, Jr. It is believed that the subject light fixture was installed by Construction Concepts, Inc. (c/o Hollis O. Robison, P.O. Box 746, Somerville, TN 38068); Wright & Associates; other builders; or by "decorators" brought in by the original owner or manager of the

building to provide lighting and interior décor in completion of the building. Upon information and belief, Defendant VIM, Inc. provided accounting and managing services for the business until November 18, 1994, when Defendant Beckley Hotel Limited Partnership sold the building to Equity Inns, Inc.

On May 4, 2006, Equity Inns, Inc. filed a Motion for Summary Judgment that sought the dismissal with prejudice of the only claim against this Appellee contained in Appellant's Complaint: the claim that Equity Inns, Inc., d/b/a The Hampton Inn was negligent in failing to properly inspect and maintain its premises in a safe manner. As demonstrated by this Appellee's Motion for Summary Judgment and all of the exhibits attached thereto, the subject light fixture fell because it was improperly installed with plastic wall expansion anchors and #8 wood screws mounted in the 5/8" gypsum board ceiling only, rather than with 1/2" x 3" Tapcon Anchors that would have reached past the ceiling, through the furring space, and into the concrete deck above, as is recommended by Lithonia Lighting, the manufacturer of the light fixture. This defective installation was performed approximately two (2) years before Equity Inns, Inc. purchased and took possession of the building in 1994. Moreover, once the installation of the offending light fixture was complete, its defects were not capable of being observed or detected by anyone changing the light bulbs or otherwise examining the fixture.

On May 10, 2006, Appellant filed a one-page Response in Opposition to Appellee's Motion for Summary Judgment. On May 22, 2006, Appellee Equity Inns, Inc. filed a Reply to Appellant's Response in Opposition to Appellee's Motion for Summary Judgment. By Memorandum and Order entered on July 27 and 28, 2006, respectively, the Circuit Court of Raleigh County granted Appellee's Motion for Summary Judgment.

On May 11, 2006, Appellant also filed a one-page Motion to Amend Complaint and for Relief from Judgment Order Dismissing Virginia Inn Management of West Virginia. On June 1, 2006, Appellee Equity Inns, Inc. filed a Response to Appellant's Motion to Amend. Appellant did not file a Reply to Equity Inns' Response. By Memorandum and Order entered on July 28 and August 2, 2006, respectively, the Circuit Court of Raleigh County denied Appellant's Motion to Amend Complaint and for Relief from Judgment Order Dismissing Virginia Inn Management of West Virginia.

On September 22, 2006, Appellant Clifford Crum filed a Petition for Appeal with the Supreme Court of Appeals of West Virginia, claiming that that the trial court should not have granted summary judgment to Equity Inns, Inc. and that it was error for the trial court to deny his Motion to Amend the Complaint, including the new claims of *res ipsa loquitur* and strict liability. On October 18, 2006, Appellee Equity Inns, Inc. filed a Brief in Opposition to Appellant's Appeal, showing that the trial court properly granted Equity Inns, Inc.'s Motion for Summary Judgment and that the trial court appropriately denied Appellant's Motion to Amend the Complaint.

After filing the Petition for Appeal, counsel for Clifford Crum purportedly located a Deed indicating that the subject accident of July 7, 2004, occurred a few months short of ten years after the November 18, 1994, sale of the hotel to Equity Inns Partnership, LP. On December 6, 2006, Appellant Clifford Crum and Defendant VIM, Inc. filed a Joint Motion to Remand the Appeal to the Circuit Court of Raleigh County, West Virginia, because Judge Robert A. Burnside, Jr. stated in the Memorandum in support of his Order denying Plaintiff's Motion to Amend Complaint and for Relief from Judgment Order Dismissing Virginia Inn Management of West Virginia that "The injury of which Defendant (*sic*) complains in the proposed amended

complaint occurred more than ten years after Virginia Inn sold the building. It is the court's opinion that the statute of repose, W. Va. Code §55-2-6(a), bars the cause of action stated in Plaintiff's proposed amended complaint insofar as Defendant Virginia Inns is concerned."

On December 19, 2006, Appellee Equity Inns, Inc. filed an Objection to the Motion for Remand as it relates to Appellant's claim against Equity Inns, Inc., stating that the fact that the incident occurred just less than ten years after the sale of the hotel has absolutely no bearing on Clifford Crum's cause of action against Equity Inns, Inc., which owned and operated the hotel at the time of the July 7, 2004, accident.

On January 24, 2007, the West Virginia Supreme Court granted Appellant and Virginia Inn's Joint Motion to Remand this matter to the Raleigh County Circuit Court for further proceedings. On February 26, 2007, Appellant Clifford Crum filed a Motion to Amend Complaint and for Relief from Judgment Order Dismissing Virginia Inn Management of West Virginia. Appellant's newly-proposed Amended Complaint was identical to the Amended Complaint that he had submitted to the trial court on May 11, 2006, and that the Court had disallowed. On March 12, 2007, Appellee Equity Inns, Inc. filed a Response to Appellant Clifford Crum's Motion to Amend Complaint. On March 19, 2007, Appellant filed a two-page Reply.

On October 31, 2007, a hearing was conducted in the Circuit Court of Raleigh County where counsel for all parties offered oral arguments in support of their positions on, among other things, (1) whether the summary judgment granted by the trial court in favor of Appellee Equity Inns, Inc. on July 27 and 28, 2006, regarding Appellant's negligence claim should be set aside and (2) whether Appellant Clifford Crum should be permitted to amend his Complaint to state claims against Equity Inns, Inc. based on the legal theories of *res ipsa loquitur* and strict liability

although the trial court had ruled by Memorandum and Order entered on July 28 and August 2, 2006, that such claims could not be maintained against this Appellee.

At the October 31, 2007, hearing and as memorialized in an Order entered on December 10, 2007, the Circuit Court of Raleigh County held that there was no reason to disturb its prior ruling which granted summary judgment to Appellee Equity Inns, Inc. As such, the summary judgment granted in favor of Equity Inns, Inc. stands, and Appellant Clifford Crum's Motion to Amend his Complaint as it relates to Equity Inns, Inc. was denied. In issuing this ruling, the Honorable Robert A. Burnside, Jr. stated that "the amended complaint does not allege new allegations against [Equity Inns, Inc.] that were not disposed of already in the . . . grant of summary judgment." Tr. of Oct. 31, 2007, Hr'g., p. 50, lines 8-14.

## **II. APPELEE'S RESPONSE TO THE ALLEGED ERRORS**

1. The trial court properly granted the Motion for Summary Judgment of Equity Inns, Inc. d/b/a The Hampton Inn.
2. The trial court appropriately denied Clifford Crum's Motion to Amend the Complaint to state *res ipsa loquitur* and strict liability claims against Equity Inns, Inc. d/b/a The Hampton Inn.

## **III. APPELLEE'S ARGUMENT**

The Appellate Court reviews the Trial Court's conclusions of law by a *de novo* standard. Clain-Stefanelli v. Thompson, 199 W. Va. 590, 593, 486 S.E.2d 330 (1997).

Appellant's first argument is basically that the Motion for Summary Judgment should not have been granted when discovery was pending. Appellant specifically desired to obtain defendants' insurance policies and a sales agreement regarding the hotel where the subject incident occurred. In fact, there was no discovery outstanding from Appellee Equity Inns, Inc.

when the summary judgment motion was granted. The insurance contracts had been produced. The sales agreement was not in Equity Inns' possession, but it has since been produced by VIM, Inc. to Appellant. The sales agreement does not establish that Appellee Equity Inns, Inc. is in any way liable for Appellant's injury.

Appellant's second argument is that *res ipsa loquitur*, strict liability or some theory should allow him to recover against Appellee Equity Inns, Inc. However, Appellant is simply ignoring the rules set down by this Honorable Court as to when *res ipsa* or strict liability are applicable. *Res ipsa* is not appropriate in this case because it is the negligence of third parties who caused the Appellant's injuries by improperly installing the subject light fixture; because no negligence on the part of Appellee Equity Inns, Inc. has been established; and because *res ipsa* requires that Equity Inns' negligence be the only inference that can reasonably and legitimately be drawn from the circumstances. In like manner, strict liability is not appropriate in this lawsuit because operation of a hotel is not an abnormally dangerous activity.

Appellant states in his Brief that "contrary to the fairness inherent in West Virginia jurisprudence, an innocent victim is left without any remedy for an injury which was caused by others." Appeal Brief at 2. It should be noted that at the time of the subject incident Clifford Crum was a Commissioner for Federal Mediation and Conciliation Service and was working in that capacity when his alleged injuries were sustained. *Id.* at 1. As such, Mr. Crum has received Workers' Compensation Benefits and so is not "without any remedy." See Appellant's Answer to Equity Inns' Interrogatory No. 16. Second, there have been many times down through the years where injured or damaged parties have gone without legal relief due to an expired statute of limitation, an expired statute of repose, a failure to state a claim upon which relief can be

granted, a failure of the evidence to support the causes of action pled, and any number of other situations.

Appellant states that the July 28, 2006, Order of the Court “refused to allow Mr. Crum to file any claims against the builder of the Hotel and the decorator who allegedly put in the light fixture.” Appeal Brief at 1-2. He continues to state that “an innocent victim is left without remedy for an injury which was caused by others.” Appeal Brief at 2. Appellant also contends that “[t]his is a case where it is a hard job to catch and pin down the responsible defendants and the plaintiff should have the opportunity to try [and] do so.” Appeal Brief at 6. Appellant did not tell the rest of the story, for by Order of December 10, 2007, Appellant Clifford Crum was granted permission to amend his Complaint to state claims against Beckley Hotel Limited Partnership, a previous owner of the hotel, and Construction Concepts, Inc., a decorator of the hotel. By Order of October 7, 2008, he also was permitted to amend his Complaint to state claims against Wright & Associates, a builder of the hotel. As such, Appellant has been able to 1) file claims against the builder of the Hotel and the decorator who allegedly put in the light fixture and 2) “catch and pin down the responsible defendants.”

Appellant later mentions that Construction Concepts, the decorator, has moved from West Virginia and has not yet been located. *Id.* at 3. This does not mean that appellant’s counsel could not find the corporation with effort. Appellant also states that he cannot get valid service or jurisdiction over Beckley Hotel Limited Partnership, which has withdrawn from West Virginia. *Id.* Counsel has included a January 11, 2008, letter from Sharon Barth of CT, apparently a registered agent formerly designated to accept service of process on behalf of Beckley Hotel Limited Partnership. This letter does not establish that service could not be accomplished by delivering a copy of the summons and complaint to an officer, director, or agent of the company

or by publication as permitted by Rule 4 of the West Virginia Rules of Civil Procedure. Neither is the trial court's personal jurisdiction over Beckley Hotel Limited Partnership defeated by the company's moving out of a state where it once did business.

Most importantly, however, no matter how injured Appellant Clifford Crum was by "others," Appellee Equity Inns, Inc. cannot be kept in this case where no liability can be established against it. Appeal Brief at 2. Our judicial system only holds a Defendant responsible when Plaintiff can show that such particular person or business is in some way liable or at fault. Our juries and judges cannot award money for damages unless they have first determined that Plaintiff has established Defendant's liability by a preponderance of the evidence.

**A. THE TRIAL COURT PROPERLY GRANTED THIS APPELLEE'S MOTION FOR SUMMARY JUDGMENT**

Appellant Clifford Crum claims that the trial court should not have granted summary judgment to Appellee Equity Inns, Inc. Brief at 1.

Rule 56(c) of the West Virginia Rules of Civil Procedure allows a Motion for Summary Judgment to be granted to the defendant if the pleadings, depositions, answers to interrogatories, and any admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. See also Angelucci v. Fairmont General Hosp., Inc., 217 W. Va. 364, 618 S.E.2d 373 (2005). The essence of the court's inquiry on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Wilson v. Daily Gazette Co., 214 W. Va. 208, 588 S.E.2d 197 (2003). The dispute about a material fact is genuine only when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record

compiled in the summary judgment proceedings. Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996).

In West Virginia, landowners and occupiers, such as Equity Inns, Inc., d/b/a The Hampton Inn, are not liable in negligence for injuries that occur to non-trespassing entrants of their land, unless such landowners or occupiers breach their duty of reasonable care under the circumstances. Mallet v. Pickens, 206 W. Va. 145, 155, 522 S.E.2d 436, 446 (1999). In order to establish a prima facie case of negligence in West Virginia, a plaintiff like Clifford Crum must show that a defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action will lie without a duty broken. Jack v. Fritts, 193 W. Va. 494, 457 S.E.2d 431 (1995); Parsley v. General Motors Acceptance Corp., 167 W. Va. 866, 280 S.E.2d 703 (1981).

On May 4, 2006, Appellee Equity Inns, Inc., d/b/a The Hampton Inn filed a Motion for Summary Judgment that sought the dismissal with prejudice of the only claim against this Appellee contained in Appellant's Complaint: the claim that Equity Inns, Inc., d/b/a The Hampton Inn was negligent in failing to properly inspect and maintain its premises in a safe manner. The Motion was supported, *inter alia*, by an April 12, 2006, report of Francis A. Guffey, II, FAIA, who explained that once the installation of the offending light fixture was complete, its defects were not capable of being observed or detected by anyone changing the light bulbs or otherwise examining the fixture.

Specifically, on March 7, 2006, Francis A. Guffey, II, FAIA, an expert Architect and Planner, visited The Hampton Inn to observe the conditions present in the meeting room where a ceiling light fixture was alleged to have fallen and injured Appellant Clifford Crum. Mr. Guffey also reviewed photographs taken contemporaneously with the subject incident. Mr. Guffey spoke with Lithonia Lighting, the manufacturer of the light fixture who informed him that one entire

fixture weighed 33 pounds and should be anchored at all four corners to the concrete deck above, with the anchors passing through the drywall ceiling and furring space. Please see March 21, 2006, emails from Lithonia Lighting, attached to the Appellee's Motion for Summary Judgment as Exhibit A.

Mr. Guffey indicated in his April 12, 2006, written report that the anchoring system utilized by Construction Concepts, Inc. or by the "decorators" brought in by Virginia Inn Management included plastic wall expansion anchors and #8 wood screws. The plastic anchors were mounted in the 5/8" gypsum board ceiling only. This was a totally improper method of anchoring this fixture as the pullout resistance of the anchor is extremely low. Please see April 12, 2006, Report of Francis Guffey, attached to Appellee's Motion for Summary Judgment as Exhibit B. Please also see blueprint diagrams prepared by W.R. Eades, Jr. regarding The Hampton Inn, attached to Appellee's Motion for Summary Judgment as Exhibit C. Nevertheless, after this installation was completed and observed, there were no visual indications of the length of the anchor or what it penetrated. Specifically, this type of anchoring would not be apparent to anyone changing the light bulbs or otherwise examining the fixture. Please see April 12, 2006, Report of Francis Guffey.

After the fixture fell, Equity Inns, Inc., d/b/a The Hampton Inn retained Lowe Brothers Electric to reinstall the fallen fixture, as well as another identical fixture in the room that had not fallen. This time the fixture was anchored through the gypsum board, through the furring space, and into the concrete deck above using 1/2" x 3" Tapcon Anchors. This is a secure and approved installation. Id. Please also see August 13, 2004, Invoice and Description of Work by Lowe Bros. Electric Co., Inc., attached to Appellee's Motion for Summary Judgment as Exhibit D.

It is clear, however, that Equity Inns, Inc., d/b/a The Hampton Inn is not the person or entity which incorrectly installed the subject light fixture back in 1992. This defective installation was performed by Construction Concepts, Inc.; Wright & Associates; other builders; or by "decorators" brought in by Beckley Hotel Limited Partnership or VIM, Inc. to provide lighting and interior décor two (2) years before Equity Inns, Inc., d/b/a The Hampton Inn purchased and took possession of the building in 1994. Furthermore, as indicated in the April 12, 2006, Report of Francis Guffey, once the installation was complete, its defects were not capable of being observed or detected because the plastic wall expansion anchors and the length of the too-short screws were hidden in the ceiling with only the non-distinguishable heads showing. As should then be anticipated, from 1994 when it purchased the building until July 7, 2004, when the subject incident occurred, Equity Inns, Inc., d/b/a The Hampton Inn received no notice of a defect in the way that the subject light fixture was attached to the ceiling; received no complaints from anyone whatsoever regarding this or similar lighting fixtures; and had not been required to perform maintenance on the light fixtures. Please see May 4, 2006, Affidavit of Rebecca Bailey, General Manager of The Hampton Inn, attached to Appellee's Motion for Summary Judgment as Exhibit F.

If a moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary. Stonewall Jackson Memorial Hosp. Co. v. American United Life Ins. Co., 206 W. Va. 458, 525 S.E.2d 649 (1999); Parkette, Inc. v. Micro Outdoors Advertising, LLC, 217 W. Va. 151, 617 S.E. 2d 501

(2005). To meet its burden, the nonmoving party on a motion for summary judgment must offer more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor. The evidence illustrating the factual controversy cannot be conjectural or problematic. Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Chafin v. Gibson, 213 W. Va. 167, 578 S.E.2d 361 (2003). The nonmoving party must also present evidence that contradicts the showing of the moving party by pointing to specific facts demonstrating that there is a trial-worthy issue which is not only a genuine issue but also is an issue that involves a material fact. Moreover, the nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another. Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995). The party opposing a motion for summary judgment may not rest on allegations of his or her unsworn pleadings and must instead come forth with evidence of a genuine factual dispute. Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial. Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996); Miller v. City Hosp., Inc., 197 W. Va. 403, 475 S.E.2d 495 (1996).

Rule 56(e) of the West Virginia Rules of Civil Procedure clearly reveals that once a properly supported Motion for Summary Judgment has been made, Plaintiff has the burden of producing affidavits, depositions, answers to interrogatories, and/or a response which set(s) forth specific facts showing that there is a genuine issue for trial. In his one-page Response to Equity Inns' Motion for Summary Judgment, Appellant Clifford Crum produced none of these documents and set forth no facts showing a genuine issue for trial. Appellant merely stated that Appellee's Motion is premature. Pl.'s Memo. at 1. Rule 56(f) of the West Virginia Rules of Civil Procedure requires more than this from a party opposing a Motion for Summary Judgment on the

basis that he has not yet been able to conduct sufficient discovery. Rule 56(f) provides that the party opposing the Motion must submit a sworn affidavit setting forth the reasons that the party cannot present affidavits, other evidence, or facts that would justify the party's opposition.

The West Virginia Supreme Court stated in Elliott v. Schoolcraft, 213 W. Va. 69, 576 S.E.2d 796 (2002) that an opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. At a minimum, however, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier. Id. at 73, 800. In his one-page Response, Appellant Clifford Crum addressed and satisfied none of these four requirements.

Appellant states that "[s]ummary judgment was . . . granted upon the written report of Francis A. Guffey, II, an architect who was hired by Equity Inns." Appeal Brief at 5. Appellant has never disputed the opinions contained in Mr. Guffey's report, but has continuously relied upon the same during the course of this case. In considering Equity Inns' Motion for Summary Judgment, the trial court noted that Clifford Crum did "not dispute[] that the moving Defendant played no role in the construction of the building, nor in particular, in the installation of the light fixture." July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 1-2. The court further remarked that "Plaintiff's response does not challenge the opinion of Defendant's expert that the failure of the lighting fixture was due to a construction defect and not by the Defendant's

insufficient maintenance or inspection of the fixture.” July 27, 2006, Memo. Granting Equity Inns’ Mot. For Sum. Judg. at 2. The Court finally found that Clifford Crum did not offer specific facts or evidence showing that there is a genuine issue remaining for trial, analyzing the situation as follows:

With respect to this Defendant, the Plaintiff’s action is one of premises liability, grounded on the allegation that the Plaintiff was injured by a defect in the premises. It is clear from the Plaintiff’s response to the motion for summary judgment that he cannot produce any evidence to support the conclusion that Defendant Equity Inns, as the owner of the premises and the operator of the hotel, breached a duty owed to the Plaintiff. Plaintiff does not claim that the defect was caused by any act of the Defendant in the installation of the fixture, its maintenance, or that the construction defect was such that it could have been detected by Defendant upon a reasonable inspection, such that the Defendant would have had notice of the defect and an opportunity to correct it. Plaintiff does not contest the affidavit of the Defendant’s expert witness, but in fact he relies upon it in his separate motion to amend his complaint.

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In the present action, the Rule 56 motion, response, and reply showed that the Plaintiff is unable to produce evidence that raises an issue of fact whether the moving Defendant either participated in the installation of the light fixture or failed to use reasonable care to maintain and inspect it. With particular reference to the latter point, it is noted that the Plaintiff presented no evidence contrary to the observation by the Defendant’s expert witness that the defect which caused the accident would not have been apparent during the changing of light bulbs or an examination of the fixture.

July 27, 2006, Memo. Granting Equity Inns’ Mot. For Sum. Judg. at 2-3, 4-5. These are proper findings by the trial court and are supported by the evidence of record.

Nevertheless, Clifford Crum claims in his Brief that the lower Court hastily granted Summary Judgment to Equity Inns, Inc. despite the fact that there was a Motion filed to amend his Complaint and there was outstanding written discovery. Appeal Brief at 1, 5-6. First,

summary judgment was not hastily granted. Appellant filed suit on March 31, 2005. Appellee Equity Inns, Inc. did not file a Motion for Summary Judgment until more than a year later on May 4, 2006. The summary judgment was not granted until July 27, 2006, after the issue had been fully briefed.

Second, with regard to the claim that Clifford Crum's Motion to Amend should have prevented the granting of Equity Inns' Motion for Summary Judgment, the trial court correctly held that the proposed amended complaint rehashed the same two issues of improper installation of the light fixture and improper inspection/maintenance of its premises, which were already disposed of in considering the Motion for Summary Judgment. Particularly, the trial court explained,

An examination of the proposed amended complaint discloses that it does not state any allegations against this defendant that were not among the issues raised in the Rule 56 motion. The only factual allegations in the amended complaint against the moving Defendant are that it (among "all defendants") failed to "properly install . . . the fixture" and that Hampton (the moving Defendant) was negligent "in failing to properly inspect and maintain its premises in a safe manner." (Par. 11).

Both of these issues were disposed of in the consideration of the motion for summary judgment. There is no dispute that the moving Defendant did not participate in the installation of the fixture, and the Plaintiff presented no factual material in response to the Defendant's expert's report that points to any specific act or omission which could constitute the failure to maintain or inspect the light fixture in a way which could have disclosed the defect.

July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 4.

The trial court also considered, but rejected, Appellant's attempt to keep his case against Equity Inns alive by amending his complaint to rely upon the legal principle of *res ipsa loquitur*.

The court's in-depth assessment of this theory proceeded as follows:

Plaintiff's proposed amended complaint alleges in Count 13 that the moving Defendant is "liable to the plaintiff under the theory of Res Ipsa Loquitur since the light fixture was under the exclusive control and management of defendant Equity Inn." Count 13 asserts the application of a legal principle as distinguished from the assertion of a fact. As such, the Court is permitted to determine, as a legal issue, whether the reliance on res ipsa loquitur in Count 13 is sufficient to defeat the Rule 56 motion for summary judgment.

It is well established that the principle of res ipsa loquitur does not create a cause of action. It is, rather, an evidentiary principle that allows the trier of fact to infer negligence when three criteria are present: "1) the instrumentality which causes the injury must be under the exclusive control and management of the defendant; 2) the plaintiff must be without fault; and, 3) the injury must be such that in the ordinary course of events it would not have happened had the one in control of the instrumentality used due care."

The permissible inference is not a substitute for a factual basis upon which to find negligence. "In making general allegations of fault, stated without support, a party cannot avoid summary judgment merely because the doctrine of res ipsa loquitur is invoked. The plaintiff must still produce evidence to establish the existence of a genuine issue of material fact for a res ipsa loquitur case to survive." Syl. Pt. 6, Bronz v. St. Jude's Hosp. Clinic, 184 W. Va. 594, 402 S.E. 2d 263 (1991).

July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 4.

After considering Clifford Crum's misplaced reliance on *res ipsa loquitur* in his proposed amended complaint, as well as the failure of the proposed amended complaint to make any factual assertions that have not been addressed in the Rule 56 analysis, the trial court correctly ruled that the Appellant's proposed amended complaint was not sufficient to defeat the Rule 56 motion. Accordingly, Appellee Equity Inns, Inc., d/b/a the Hampton Inn's Motion for Summary Judgment on the Appellant's original complaint was properly granted.

Third, it should be noted that Appellant Clifford Crum did not have any outstanding written discovery when the summary judgment was ruled upon. Appellant states that he sought

discovery "as to the insurance policies and contracts between the parties to the sale and construction of what is now the Hampton Inn, which may shed light on who is responsible for the condition which caused the light fixture to fall on Mr. Crum." Appeal Brief at 1, 3. As the trial court specifically acknowledged, it is hard to say how insurance policies and sales contracts could shed light on who is responsible for the condition that caused the subject light fixture to fall. By all accounts, the builders and/or decorators who installed the light fixture are responsible for its falling because it was inadequately anchored to the ceiling in a way that could not be detected by anyone examining the fixture. See Francis Guffey's Report.

Nevertheless, on January 31, 2006, Equity Inns, Inc. d/b/a The Hampton Inn produced its Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents. On February 17, 2006, Equity Inns produced its Supplemental Response to Plaintiff's Requests for Production of Documents, providing a copy of its commercial insurance policy with Travelers Property Casualty Company of America. On March 1, 2006, Equity Inns produced its Supplemental Answers to Plaintiff's First Set of Interrogatories. On May 5, 2006, Equity Inns produced its Second Supplemental Response to Plaintiff's Requests for Production of Documents. On June 20, 2006, Equity Inns produced its Answers to Plaintiff's Second Set of Combined Interrogatories and Requests for Production to the Defendants, providing information regarding VIM, Inc.'s apparent insurance coverage through Aetna Casualty & Surety Co. while the hotel was being built. At the time of the trial court's consideration of the Motion for Summary Judgment, as now, Appellee Equity Inns, Inc. had already provided Clifford Crum with every document that was responsive to his requests and found in Equity Inns' possession or provided to its undersigned counsel from other sources. At the time that the Motion for Summary

Judgment was decided, Appellant actually did have copies of insurance policies covering Equity Inns and VIM, Inc.

With regard to the claim that pending discovery should have prevented the granting of Equity Inns' Motion for Summary Judgment, Appellant states elsewhere in the Brief that it needs to review the sales agreement whereby Appellee Equity Inns, Inc. purchased the hotel. Appeal Brief at 1, 3, 7. Appellee Equity Inns indicated in discovery responses on January 10, 2006, (response to request for production 10) and June 20, 2006, (response to request for production 4) that it did not have the sales contract to produce but had requested it from multiple sources and would produce it if able. At a hearing on October 31, 2008, Equity Inns joined Appellant Clifford Crum's Motion to Compel VIM, Inc.'s disclosure of the Contract. On November 18, 2008, Appellant was provided a copy of the Agreement of Purchase and Sale concerning the hotel at issue in this case. The sales contract specifically states that

8.1 Liability of Purchaser. Except for any obligation expressly assumed or agreed to be assumed by the Purchaser hereunder, the Purchaser does not assume any obligation of the Seller or any liability for claims arising out of any occurrence prior to Closing.

October 19, 1994, Agreement of Purchase and Sale. Therefore, the sales agreement does not assist Appellant in his attempt to impute liability to Appellee Equity Inns, Inc.

In addition, when Clifford Crum responded to Equity Inns' Motion for Summary Judgment, he had the opportunity to discuss how his situation in the instant matter met the criteria necessary for the suspension of consideration of a motion for summary judgment on the grounds that discovery is not complete, but he did not engage in such a discussion. Therefore, the trial court properly held the following:

Plaintiff's argument that the motion is "premature" because discovery it (*sic*) not complete is not supported by Rule 56. Defendant correctly cited to the four criteria stated in Elliot v.

Schoolcraft, 213 W. Va. 69, 576 S.E.2d 796 (2002) for the suspension of consideration of a motion for summary judgment on the grounds that discovery is not complete. Without reviewing the criteria in detail, it is sufficient to note that they require the party to identify with reasonable specificity the facts to be discovered, to explain how those facts might show that there is a genuine issue of material fact that would defeat summary judgment, and to show why he had not already engaged in that discovery.

Plaintiff's response identifies two areas of discovery: (1) the insurance contracts, and (2) the "contracts between the parties to the sale and construction" of the building, on the grounds that these materials "may shed light on who is responsible for the condition which caused the light fixture to fall on [the plaintiff]." Plaintiff does not explain, however, how the insurance contract might shed light on that issue, and it is difficult to conceive of any means by which the insurance contract would assist the trier of fact to determine what caused the light fixture to fall. July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 3.

If by "contracts . . . of sale" the Plaintiff is referring to the contract by which the moving Defendant purchased the building from its predecessor in title, it is Plaintiff's burden under Rule 56 to explain how an examination of the contract for the sale of the building would assist in understanding what caused the light fixture to fall. The contract of sale preceded the event by about ten years, so it is difficult to understand how the contract of sale would explain the event. Plaintiff chose not to explain that point, nor did he explain why he had not already obtained that contract by discovery.

July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 3.

As shown by the aforementioned discussion, the trial court properly granted the Motion for Summary Judgment of Equity Inns, Inc. d/b/a The Hampton Inn, and its decision in this regard should be upheld.

**B. THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S MOTION TO AMEND THE COMPLAINT**

On May 11, 2006, Appellant Clifford Crum filed a motion to amend the complaint and for relief from judgment as to the previous order dismissing Defendant VIM., Inc. In accordance

with the briefing schedule issued on May 12, 2006, Appellees Equity Inns, Inc. and VIM., Inc. filed separate responses to the motion. Appellant filed a reply to the response of VIM., Inc. but not to the response of Equity Inns. By Memorandum and Order entered on July 28 and August 2, 2006, respectively, the Circuit Court of Raleigh County denied Appellant's Motion to Amend Complaint and for Relief from Judgment Order Dismissing VIM., Inc.

A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend. Poling v. Belington Bank, Inc., 207 W.Va. 145, 529 S.E.2d 856 (1999), citing Syl. Pt. 6, Perdue v. S.J. Groves & Sons Co., 152 W. Va. 222, 161 S.E.2d 250 (1968).

In Poling, the West Virginia Supreme Court held that the Circuit Court did not abuse its discretion in denying a Motion to Amend, and affirmed the Circuit Court's ruling denying a Motion to Amend. 207 W.Va. 145, 529 S.E.2d 856. In Poling, the case had been pending less than ninety days, the parties had exchanged pleadings, service on a third party defendant had been made, but no answer had been filed. Id. The Circuit Judge attempted to pursue the basis for these new allegations and determined these were "naked assertions." The West Virginia Supreme Court held that the Circuit Court correctly ruled that the amendment was precluded on the basis of lack of duty owed because the appellants raised no issues in the amended complaint which are not covered by the applicable statutes. Id.

Moreover, a motion to amend is futile, and thus should be denied, if the proposed amendment "is clearly insufficient because of substantive or procedural considerations." Goewey

v. United States, 886 F.Supp. 1268, 1284 (D.S.C.1995); see Frank M. McDermott, Ltd. v. Moretz, 898 F.2d 418, 421 (4th Cir.1990) (“There is no error in disallowing an amendment when the claim sought to be pleaded by amendment plainly would be subject to a motion to dismiss.”).

Appellant Clifford Crum claims that it is error for the trial court to deny his Motion to Amend the Complaint, including the new claims of *res ipsa loquitur* and strict liability. Appeal Brief at 1, 5-6. The Appellant’s Motion to Amend was correctly denied because it was futile, clearly insufficient, and subject to the Appellee Equity Inns, Inc.’s Motion to Dismiss.

### **1. NEGLIGENCE INSTALLATION**

In the Appellant’s proposed amended complaint, Clifford Crum alleges in paragraph 11, “As a direct and proximate result of **all defendants’** negligence in failing to properly install/attach the lighting fixture to the ceiling, and defendant Hampton’s negligence in failing to properly inspect and maintain its premises in a safe manner, the lighting fixture came loose from the ceiling, fell, and struck the plaintiff in the head . . . .” (emphasis mine).

In its Response to the Motion to Amend, Appellee Equity Inns, Inc., d/b/a The Hampton Inn asserted that to the extent that Appellant was attempting to encompass Equity Inns, Inc. in the phrase “all defendants” and to state a claim of negligence against Equity Inns for “failing to properly install/attach the lighting fixture to the ceiling,” Equity Inns objects to the same. As set forth in the factual allegations of the proposed amended complaint, Equity Inns is not the person or entity which incorrectly installed the subject light fixture back in 1992. It was not until 1994 that Equity Inns purchased the building. In considering Equity Inns’ Motion for Summary Judgment, the trial court noted that Clifford Crum did “not dispute[] that the moving Defendant played no role in the construction of the building, nor in particular, in the installation of the light fixture.” July 27, 2006, Memo. Granting Equity Inns’ Mot. For Sum. Judg. at 1-2. As such, the

trial court appropriately denied Appellant the right to amend his Complaint to state a claim against this Appellee for negligent installation of the light fixture. Moreover, Appellant does not contend in his Appeal Brief that Appellee Equity Inns, Inc. installed the light fixture or that he should be permitted to pursue a claim against Equity Inns for negligent installation.

## **2. RES IPSA**

In the Appellant's proposed amended complaint, Clifford Crum alleges in Count II and paragraph 13, "Defendant Equity Inn, Inc. d/b/a The Hampton Inn, and/or all other defendants are also liable to the plaintiff under the theory of Res Ipsa Loquitur since the light fixture in question was under the exclusive control and management of defendant Equity Inn, Inc. d/b/a The Hampton Inn, and/or all other defendants. Mr. Crum was entirely without fault and his injuries would not have happened in the ordinary course of events had the defendants in control used dire (*sic*) care."

In its Response to the Motion to Amend, Appellee Equity Inns objected to Appellant's amending his Complaint to allege Count II because Clifford Crum cannot state a legitimate claim against this Appellee based upon *res ipsa*. Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (1) the event is of a kind which ordinarily does not occur in the absence of negligence; (2) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (3) the indicated negligence is within the scope of the defendant's duty to the plaintiff. Syl. Pt. 3, Kyle v. Dana Transport, Inc., 220 W. Va. 714, 649 S.E.2d 287 (2007); Beatty v. Ford Motor Co., 212 W. Va. 471, 574 S.E.2d 803 (2002); Syl. Pt. 4, Foster v. City of Keyser, 202 W. Va. 1, 501 S.E.2d 165 (1997); Restatement 2d of Torts §328D (1965).

When considering the Appellant's Motion to Amend, the trial court found that it is well established that the principle of *res ipsa loquitur* does not create a cause of action. It is, rather, an evidentiary principle that allows the trier of fact to infer negligence when three criteria are present: "1) the instrumentality which causes the injury must be under the exclusive control and management of the defendant; 2) the plaintiff must be without fault; and, 3) the injury must be such that in the ordinary course of events it would not have happened had the one in control of the instrumentality used due care." July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 4. The permissible inference, however, is not a substitute for a factual basis upon which to find negligence. "In making general allegations of fault, stated without support, a party cannot avoid summary judgment merely because the doctrine of *res ipsa loquitur* is invoked. The plaintiff must still produce evidence to establish the existence of a genuine issue of material fact for a *res ipsa loquitur* case to survive." Syl. Pt. 6, Bronz v. St. Jude's Hosp. Clinic, 184 W. Va. 594, 402 S.E. 2d 263 (1991). July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 4. The court had previously noted that "it is clear from the Plaintiff's response to the motion for summary judgment that he cannot produce any evidence to support the conclusion that Defendant Equity Inns, as the owner of the premises and the operator of the hotel, breached a duty owed to the Plaintiff." July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 2.

After considering Clifford Crum's misplaced reliance on *res ipsa loquitur* in his proposed amended complaint, as well as the failure of the proposed amended complaint to make any factual assertions that would create a genuine issue for trial, the trial court correctly ruled that the Appellant's proposed amended complaint was not sufficient to defeat the Rule 56 motion. Accordingly, it was appropriate for the trial court to deny Appellant's Motion to Amend his

Complaint to state a *res ipsa loquitur* claim against this Appellee. The court's following analysis clearly explains why it refused to permit Appellant to amend his complaint to allege a *res ipsa* cause of action against Equity Inns, which could never be supported by the applicable facts and evidence:

An examination of the proposed amended complaint discloses that the only factual allegations in the amended complaint against the moving Defendant are that it (among "all defendants") failed to "properly install . . . the fixture" and that Hampton (the moving Defendant) was negligent "in failing to properly inspect and maintain its premises in a safe manner." (Par. 11).

Both of these issues were disposed of in the consideration of the motion for summary judgment. There is no dispute that Equity Inns did not participate in the installation of the fixture, and the Plaintiff presented no factual material in response to the expert report of Francis Guffey that points to any specific act or omission which could constitute the failure to maintain or inspect the light fixture in a way which could have disclosed the defect.

July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 4.

Appellant claims that Francis Guffey's "report, on it[s] face, leaves possible inferences that Equity Inns would be responsible for contribution to the accident." Appeal Brief at 5. Appellant quotes Mr. Guffey's findings that

The furnished photos indicate a light frame that was to be anchored to the ceiling in four locations. The anchoring system used included plastic wall expansion anchors and #8 wood screws. The plastic anchor was mounted in the 5/8" gypsum board ceiling only. This is a totally improper method of anchoring this fixture, as the pullout resistance of the anchor is extremely low. This type of anchoring would not be apparent to anyone changing the light bulbs or otherwise examining the fixture.

Id. Then Appellant concludes that "[t]here is clearly the inference that if it was owned by Equity Inns for almost 10 years, they might have in changing the bulbs or cleaning the light fixture hastened the process of the light fixture falling. There is also a legally permissible inference that

Equity Inns did not properly inspect the building before they purchased it.” Id. Later, Appellant states “[w]e would also urge the proposition as pled that there is a duty to inspect a multi-million dollar building and that caveat emptor is applicable.” Id. at 7.

First, how can Appellant argue that “[t]here is also a legally permissible inference that Equity Inns did not properly inspect the building before they purchased it” just after relying on Mr. Guffey’s conclusion that “[t]his type of anchoring would not be apparent to anyone changing the light bulbs or otherwise examining the fixture.”? If the improper method of anchoring the fixture was not apparent upon examination or inspection, then Equity Inns’ proper inspection of the building prior to purchase could not have revealed any defects.

Second, Appellant Clifford Crum cannot satisfy the second criteria necessary for the invocation of *res ipsa loquitur*, for other responsible causes – including the conduct of third persons – have not been sufficiently eliminated by the evidence. In fact, the conduct of third persons who incorrectly installed the light fixture has been overwhelmingly implicated by the evidence to have been the responsible cause for the instant incident. Clifford Crum has indicated that there are multiple actors, in addition to Equity Inns, Inc, who may have been negligent and who could have caused his injury: Construction Concepts, the builder; Wright & Associates, another builder; unknown decorators; Beckley Hotel Limited Partnership, the original owner; and VIM, Inc., the previous manager. By accepting that the builders and/or contractors erred in installing the light fixture, Appellant acknowledges that he cannot meet the second criteria for establishing a *res ipsa* claim because other responsible causes, including the conduct of third parties, are not sufficiently eliminated by the evidence. That is why Appellant admits that “our claim would appear to be eliminated . . . because part (1) (b) of the restatement would apply.” Appeal Brief at 7. Appellant then states “that, and precisely that, is why we seek contracts,

agreements and other avenues of determining what is the arrangement between Equity Inns and their now out of business seller, Beckley Hotel Limited Partnership. We seek to determine not only who was responsible for the alleged negligent installation, but what duties and obligations were assumed by Equity Inns when they purchased this 7 million dollar hotel.” Appeal Brief at 7. As discussed previously, the sales agreement that has been provided to Appellant shows that Equity Inns did not assume any duties or obligations that would make them liable for Mr. Crum’s injury.

Third, Appellant Clifford Crum is only engaging in conjecture and presumption when he asserts that Equity Inns may have engaged in negligence because it “**might have** in changing the bulbs or cleaning the light fixture hastened the process of the light fixture falling.” Appeal Brief at 5. Appellant later says that “[t]he cleaning and changing of bulbs which Equity Inns admits was done by their employees **may well have** contributed to the accident and caused the fixture to fall. We don’t know. Unless we are allowed to proceed on our theory of *res ipsa loquitur*, we cannot develop a factual basis for this theory which is and should be Mr. Crum’s right as an injured West Virginia.” *Id.* at 6. Clearly though, the West Virginia Supreme Court held in Syl. Pt. 5, Kyle v. Dana Transport, Inc., 220 W. Va. 714, 649 S.E.2d 287 (2007), that

“The doctrine of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. The doctrine applies only in cases where defendant’s negligence is the only inference that can reasonably and legitimately be drawn from the circumstances.” Syl. Pt. 5, Davidson’s, Inc. v. Scott, 149 W.Va. 470, 140 S.E.2d 807 (1965).” Syl. Pt. 2, Farley v. Meadows, 185 W.Va. 48, 404 S.E.2d 537 (1991).

Syl. Pt. 5, Kyle v. Dana Transport, Inc. See also Neely v. Belk Incorporated, 668 S.E.2d 189, n. 13 (W. Va. 2008); Gibson v. Little General Stores, Inc., 221 W. Va. 360, 362, n. 1, 655 S.E.2d

106, 108 (2007) (per curium) (summary judgment was appropriate because *res ipsa* claim could not be stated where plaintiff failed to submit evidence, lay or expert, as to the cause of her alleged accident.). It is apparent from Clifford Crum's Appeal Brief – as well as his counsel's oral argument during the October 31, 2007, hearing – that there is not one scintilla of evidence that has been produced to support Appellant's conjecture and presumption that Appellee Equity Inns, Inc. as the owner of the premises and the operator of the hotel, somehow breached a duty owed to Clifford Crum.

Appellant states that "it is obvious when reviewing the restatement as it relates to the evidence in this case that without negligence the light would not have fallen, but it is problematical that an owner can escape its obligation when they have owned the building for almost 10 years." Appeal Brief at 7. Of course, all involved in the case have agreed that the negligence which caused the light fixture to fall was that of the installers of the fixture. Moreover, in West Virginia, landowners and occupiers, such as Equity Inns, Inc., d/b/a The Hampton Inn, are not liable in negligence for injuries that occur to non-trespassing entrants of their land, unless such landowners or occupiers breach their duty of reasonable care under the circumstances. Mallet v. Pickens, 206 W. Va. 145, 155, 522 S.E.2d 436, 446 (1999). Appellant has presented no factual material in response to the expert report of Francis Guffey that points to any specific act or omission which could constitute the failure to inspect the light fixture in a way which could have disclosed the defect or the failure to maintain. July 27, 2006, Memo. Granting Equity Inns' Mot. For Sum. Judg. at 4. As such, there is no evidence that Appellee Equity Inns has breached any duty of reasonable care under the circumstances.

In Foster v. City of Keyser, 202 W.Va. 1, 501 S.E.2d 165 (1997), the West Virginia Supreme Court held that "It is the function of the [trial] court to determine whether the inference

[that plaintiff's harm was caused by negligence of the defendant] may reasonably be drawn by the jury, or whether it must necessarily be drawn." Id. The Supreme Court further said:

We recognize that in taking this step, we cannot bring to an end all disputes about the rule of *res ipsa loquitur* or its application; we simply hope that they will occur in a more useful frame-work. Circuit courts will have to take a common-sense approach and apply the principles in the *Restatement* formulation in a practical fashion on a case-by-case basis - and in light of our past cases, insofar as they are consistent with the *Restatement* formulation. And we will have to afford circuit courts a reasonable discretion as they do so.

Id. Nevertheless, in this instance, Appellant Clifford Crum does not want the Circuit Court of Raleigh County to be provided the opportunity to exercise its discretion. Rather, Appellant wants the West Virginia Supreme Court to allow him to obtain compensation against Equity Inns, Inc. even if the sole negligent actor is the contractor who installed the light fixture two years before Equity Inns took possession of the building and over a decade before the fixture fell. He does not want the Circuit Court to consider the only evidence that has been produced to explain how the light fixture fell - evidence which shows that *res ipsa loquitur* does not apply to Appellee Equity Inns, Inc. in this case: (1) the light fixture fell due to improper anchoring of screws which should have reached past the ceiling, through the furring space, and into the concrete deck above; and (2) no one could have looked at the installation and known the depth penetrated by the support screws without taking them out one by one. As such, Clifford Crum seeks to make Equity Inns, Inc. liable even though there is no evidence that it did anything wrong during the nearly ten years that it owned and operated the hotel. Any argument that Appellant should be able to pursue a *res ipsa* claim because Appellee Equity Inns, Inc. failed to inspect or maintain its premises is eviscerated where Appellant's injury was caused by a defect in the installation of

a light fixture, where Equity Inns, Inc. had nothing to do with such installation, and where this Appellee could not discover such defect by any reasonable means.

Appellant finally contends that "there is no way that defendant's evidence pinpoints who actually installed the defective light fixture. Mr. Guffey says it was a decorator brought in by the prior owner, as conveyed to him by the project architect. This is not even evidence which is admissible. There is no record provided to support this conclusion. It is inadmissible hearsay and a serious personal injury should not be defeated by such minimal proof." Appeal Brief at 7-8. All persons involved in this case concede that Equity Inns was not the one who installed the light fixture and was not the owner of the hotel when the fixture was installed. In addition, it is not the duty of Equity Inns to specifically identify who caused Clifford Crum's injury, just to prove through the Motion for Summary Judgment that Mr. Crum cannot prevail against it. Moreover, based upon Mr. Guffey's report, Appellant was granted the opportunity to amend his complaint to bring Construction Concepts and Wright & Associates into the case as parties. Appellant will have to explore himself with the architect, builders, owners, and other witness who was precisely the individual or company that installed the light fixture.

### **3. STRICT LIABILITY**

In the Appellant's proposed amended complaint, Clifford Crum alleges in Count III and paragraph 15, "Defendants Equity Inn, Inc. and all others are strictly liable to the plaintiff because the situation he faced with the falling light fixture was inherently dangerous to plaintiff."

In its Response to the Motion to Amend, Appellee Equity Inns objected to Appellant's amending his Complaint to allege Count III because he cannot state a legitimate claim against this Defendant based upon strict liability. Restatement 2d of Torts §519 (1977) provides that (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the

person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm; and (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous. Restatement 2d of Torts §520 (1977) states that in determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. The Supreme Court of Appeals of West Virginia in Peneschi v. National Steele Corp., 170 W. Va. 511, 295 S.E.2d 1 (1982) explicitly adopted into the common law of West Virginia the Fletcher v. Rylands, 3 H. & C. 774, 159 Eng.Rep. 737 (1865), rev'd Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), aff'd Rylands v. Fletcher, L.R. 3 H.L. 330 (1868) doctrine of strict liability for abnormally dangerous activity, as such doctrine is articulated in the Restatement 2d of Torts (1977).

The West Virginia Supreme Court has ruled that the use of explosives in blasting operations, though necessary and lawfully used, being intrinsically dangerous and extraordinarily hazardous, renders the contractor liable for damages resulting to the property of another from such blasting, without negligence on the part of the contractor, whether the damage was caused by vibrations or by casting rocks or other debris on the complaining party's property. Whitney v. Ralph Myers Contracting Corp., 146 W. Va. 130, 118 S.E.2d 622 (1961); Moore, Kelly & Reddish, Inc. v. Shannondale, Inc., 152 W. Va. 549, 165 S.E.2d 113 (1968); Perdue v. S.J. Groves & Sons Co., 152 W. Va. 222, 161 S.E.2d 250 (1968). The Court has also held that the

storage, sale and distribution of gasoline could be an abnormally dangerous activity and is subject to the same Rylands analysis, as expressed in Restatement 2d of Torts §§519-20, that is applicable to any other activity involving similar or greater danger to the public. Bowers v. Wurzburg, 207 W. Va. 28, 528 S.E.2d 475 (1999). However, the Court determined that the activities of coal companies, timbering companies, and others whose extraction and removal of natural resources such as coal, oil, and timber allegedly altered or disturbed the natural state of the land did not constitute abnormally dangerous activities because their day-to-day activities did not necessarily create high risk of flash flooding, and any increased risk of flooding that resulted from defendants' extractive activities could be greatly reduced by exercise of due care. In re Flood Litigation, 216 W. Va. 534, 545, 607 S.E.2d 863, 874 (2004).

Comment 1 to Restatement 2d of Torts §520 provides, as follows:

Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. . . . The imposition of strict liability . . . involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city."

The Restatement 2d of Torts §§519-20 and the aforementioned cases make clear that, as a matter of law, the operation of a hotel would not constitute an abnormally dangerous activity which would subject Equity Inns, Inc., d/b/a The Hampton Inn to strict liability for the injuries and damages allegedly sustained by Appellant Clifford Crum when the light fixture fell. As such, it

was appropriate for the trial court to deny Appellant's Motion to Amend his Complaint to state a strict liability claim against this Appellee.

Appellant Clifford Crum now states "[t]he jury should be allowed to consider this case and make all appropriate inferences. That is why we urge the unusual theory of strict liability on this Court as well. There must be some rational way for Mr. Crum to be compensated." Appeal Brief at 7. Appellant boldly claims that Appellee "should be legally responsible for the incident. It occurred on their watch on their property." Appeal Brief at 3. In West Virginia, landowners and occupiers, such as Equity Inns, Inc., d/b/a The Hampton Inn, are not liable in negligence for injuries that occur to non-trespassing entrants of their land, unless such landowners or occupiers breach their duty of reasonable care under the circumstances. Mallet v. Pickens, 206 W. Va. 145, 155, 522 S.E.2d 436, 446 (1999). Here, Appellant wishes to disregard the requirement of negligence and hold owners and operators of hotels strictly liable for any injuries that occur on their premises. The West Virginia Supreme Court has held that

Courts have traditionally recognized that, '[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting to impose new duties and, concomitantly, liabilities, regardless of the economic and social burden. Thus, the courts have generally recognized that public policy and social considerations, as well as foreseeability, are important factors in determining whether a duty will be held to exist in a particular situation.'

Mallet v. Pickens, 206 W.Va. 145, 522 S.E.2d 436, 447, Fn. 15 (1999), quoting Harris v. R.A. Martin, Inc., 204 W. Va. 397, 403, 513 S.E.2d, 170, 176 (1998)(Maynard, J. dissenting) (quoting 57A Am.Jur.2d, Negligence, § 87 at 143 (1989)). As such, Appellant's request for development of a new legal theory that would apply strict liability to landowners who are not engaged in an abnormally dangerous activity should be denied, especially here where Appellant's injury was

caused by a defect in the installation of a light fixture, where Equity Inns, Inc. had nothing to do with such installation, and where this Appellee could not discover such defect by any reasonable means.

As shown by the aforementioned discussion, the trial Court appropriately denied Appellant Clifford Crum's prior Motion to Amend as it relates to Equity Inns, Inc., d/b/a The Hampton Inn. Appellant's newly-proposed Amended Complaint is identical to the Amended Complaint that he submitted to the Court on May 11, 2006, and that the Court disallowed. Appellant did not then, and does not now, provide good cause to amend his Complaint as it concerns Equity Inns, Inc. Therefore, the Court's decision in this regard should be upheld and not reversed.

#### **IV. RELIEF PRAYED FOR**

WHEREFORE, for the foregoing reasons, this Appellee prays that this Court would uphold the Circuit Court of Raleigh County's July 28, 2006, Order Granting Appellee's Motion for Summary Judgment; the August 2, 2006, Order Denying Appellant's Motion to Amend Complaint and for Relief from Judgment Order Dismissing Virginia Inn Management of West Virginia; and the December 10, 2007, Order reaffirming his previous rulings granting Summary Judgment and denying the Motion to Amend as it relates to Equity Inns, Inc.

EQUITY INNS, INC., d/b/a THE HAMPTON INN,

By counsel



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CLIFFORD CRUM,**

**Plaintiff/Petitioner**

**v.**

**Appeal No.: 080848**

**Raleigh Co. Civil Action No.: 05-C-296-B**

**EQUITY INNS, INC., d/b/a THE HAMPTON INN;  
VIM., INC.; TRAVELERS PROPERTY CASUALTY  
INSURANCE COMPANY; CONSTRUCTION CONCEPTS, INC.;  
BECKLEY HOTEL LIMITED PARTNERSHIP,  
a West Virginia Partnership; WRIGHT & ASSOCIATES;  
and JOHN DOE,**

**Defendants/Respondents**

**CERTIFICATE OF SERVICE**

I, Mary Beth Chapman, counsel for Appellee Equity Inns, Inc., d/b/a The Hampton Inn, do hereby certify that a true copy of the foregoing **"APPELLEE EQUITY INNS, INC., d/b/a THE HAMPTON INN'S BRIEF IN OPPOSITION TO APPELLANT'S BRIEF"** was served upon counsel of record as follows:

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by depositing a true copy of the same in the United States Mail, properly addressed and with postage fully paid, on this the 8<sup>th</sup> day of December, 2008.

  
\_\_\_\_\_  
MARY BETH CHAPMAN